No. 12-1380

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM NEWLAND; PAUL NEWLAND; JAMES NEWLAND; CHRISTINE KETTERHAGEN; ANDREW NEWLAND; and HERCULES INDUSTRIES, INC.,
Plaintiffs - Appellees,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; HILDA SOLIS, in her official capacity as Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; TIMOTHY GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury; and UNITED STATES DEPARTMENT OF THE TREASURY,
Defendants – Appellants.

Appeal from United States District Court
for the District of Colorado, No. 1:12-cv-01123
The Honorable **John L. Kane, Jr.**, Judge Presiding.

BRIEF OF *AMICUS CURIAE* UNITED STATES JUSTICE FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

Angela C. Thompson
ATTORNEY AT LAW
P.O. Box 163461
Sacramento, CA 95816
T: (916) 642-6534
F: (916) 290-0272

Michael R. Connelly
UNITED STATES JUSTICE FOUNDATION
932 D Street, Suite 3
Ramona, CA 92065
T: (760) 788-6624
F: (760) 788-6414

Attorneys for Amicus Curiae United States Justice Foundation

CORPORATE DISCLOSURE STATEMENT

This statement is made pursuant to Federal Rule of Appellate Procedure 26.1. Amicus curiae United States Justice Foundation (USJF) is a nonprofit California corporation, with headquarters in Ramona, California. USJF is not a subsidiary or affiliate of a publicly-owned corporation. USJF is not a publicly held corporation, trade association, or other entity having a direct financial interest in the outcome of this litigation. There is no parent corporation or any publicly-held corporation that owns 10% or more of stock in USJF.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

United States Constitution

United States Statutes

United States Regulations

Federal Register

Rules of Court

Other Authorities

INTEREST OF *AMICUS CURIAE*

Amicus curiae is the United States Justice Foundation (USJF). USJF is a nonprofit, public interest, legal action organization dedicated to instruct, inform, and educate the public, and to litigate significant legal issues confronting America. USJF is headquartered in Ramona, California. The organization was founded in 1979 by attorneys seeking to advance a Constitutional viewpoint in the judicial arena.

Since its founding, USJF has been involved in the battle for individual religious freedom and the protection of other important First Amendment rights. For example, USJF championed the fundamental right of parents to direct the education of their children in *In re Rachel L.,* 73 Cal.Rptr.3d 77 (2008). USJF was also instrumental in achieving a dismissal of criminal charges against individuals arrested for distributing pro-life literature on a California college campus. USJF is and has always been committed to protecting the First Amendment rights of Americans against governmental intrusion and infringement.

USJF believes that the Interim Final Rule promulgated by the United States Department of Health and Human Services (the "mandate") constitutes a significant infringement on the Constitutional right to free exercise of religion. The mandate impermissibly forces employers—here, specifically, the Newland family and their family-owned company, Hercules Industries—to financially

subsidize practices and procedures to which they have strong religious and moral objections, including contraception, abortifacients, and sterilizations.

USJF seeks to protect the Constitutionally-guaranteed First Amendment right to the free exercise of religion, regardless of one's status as individual, business owner, or otherwise.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), USJF certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amicus, its supporters and its counsel has made a monetary contribution to the preparation and submission of this brief. Moreover, pursuant to Federal Rule of Appellate Procedure 29(a), USJF certifies that Plaintiffs-Appellees and Defendants-Appellants have all consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

USJF submits this brief in support of Plaintiffs-Appellees, siblings William Newland, Paul Newland, James Newland and Christine Ketterhagen (hereinafter "Newland"), and their closely-held, family-owned company, Hercules Industries, Inc. (hereinafter "Hercules"). USJF's purpose in filing this brief is to offer additional perspective and argument—beyond that already skillfully presented in the appellees' principal brief—regarding whether the mandate imposes a substantial burden on the Newlands' right to freely exercise their religion—either as individuals or acting through their business. Specifically, USJF will address the following topics:

(1) The Religious Freedom Restoration Act of 1993 and its application to the instant case; and

(2) Whether the mandate, as applied to the Newlands, imposes a substantial burden on (a) the Newlands' rights to freely exercise their religion, and/or (b) Hercules' rights to freely exercise its religion.

FACTUAL BACKGROUND

In March 2010, Congress passed, and President Obama signed into law, the Patient Protection and Affordable Care Act, Pub. L. 111-148 (March 23, 2010), and the Health Care and Education Reconciliation Act, Pub. L. 111-152 (March 30, 2010), collectively known as the "Affordable Care Act" (ACA). The ACA regulates the national health insurance market by directly regulating group health plans and health insurance issuers.

Under the ACA, all employer-provided health care plans must cover—at no cost to the employee—certain "preventive services" for women. The ACA itself does not specify which preventive services must be covered, but deferred that decision to the Health Resources and Services Administration (HRSA), an agency of Defendant Department of Health and Human Services (HHS).

On August 1, 2011, HHS, under the direction of Defendant HHS Secretary Kathleen Sebelius, issued an Interim Final Rule (the "mandate"), stating that, beginning in August, 2012, employer-provided health care plans must cover all "preventive services" listed in HRSA's guidelines, without charging a co-payment, co-insurance, or deductible.[1]

The guidelines, in turn, defined "preventive services" as "the full range of the Institute of Medicine's recommended preventive services, including

[1] 76 Fed. Reg. 46623 (Aug. 3, 2011).

sterilization procedures and all FDA-approved forms of contraception."[2] These approved forms of contraception include birth-control pills, prescription contraceptive devices (including IUDs), Plan B (also known as the "morning-after pill"), ulipristal acetate (also known as "ella" or the "week-after pill"), and other drugs, devices, and procedures. The new guidelines also require the provision of sterilization procedures without deductibles or co-payments by the employees.

The guidelines did purport to provide an exemption for religious employers,[3] but the definition of a "religious employer" was so narrow as to exclude nearly all organizations other than churches. Though HHS is currently considering what accommodations may be made for religious employers that are not churches (such as universities, hospitals, schools, etc.), no accommodation has been provided for corporations such as Hercules.

A nonexempt employer who refuses to provide the required coverage is subject to penalties and fines in the amount of $100 per day, per employee.[4] Since Hercules employs and insures 265 people,[5] these penalties would amount to approximately $26,500 *per day*, or well over nine million dollars every year. Alternatively, Hercules could choose to drop employee insurance entirely and

---

[2] January 20, 2012 HHS News Release, available online at: http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited on February 26, 2013); *see also* Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* (July 19, 2011).
[3] 45 C.F.R. § 147.130(a)(iv)(B).
[4] 26 U.S.C. § 4980D (b)(1).
[5] Appellees' Opening Brief, p. 3 (filed on February 22, 2013).

incur penalties of more than half a million dollars per year, pursuant to 26 U.S.C. § 4980H.

The Newland family members are devout Catholics and believe that human life begins at conception. They are committed to operating their business in accordance with their Christian faith. As an exercise of this faith, Hercules' employee insurance policies do not provide coverage for contraceptives, abortifacients, sterilizations, or any other "preventive services" that could terminate a pregnancy or prevent a fertilized egg from implantation.

In light of the significant penalties that will be imposed for failure to comply with the mandate, it is evident that the mandate imposes a substantial burden on the Newlands' and Hercules' rights to freely exercise their religion. A discussion of the relevant legal principles follows.

ARGUMENT

I. THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE AND THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993

The First Amendment to the U.S. Constitution provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

This provision for religious freedom was—as evidenced by its place of prominence in the very first Amendment to the United States Constitution—near and dear to the hearts of America's founding fathers. Having witnessed the

disastrous consequences in England that resulted from the monarch's control of the established church, the drafters of the Bill of Rights wanted to ensure that the United States government would neither establish a state-run religion, nor trample on the right of the people to worship as they saw fit.

Accordingly, the government may not impose a substantial burden on the free exercise of religion without passing a series of demanding tests. The courts have historically gone to great lengths to preserve an individual's rights to practice his or her religion as dictated by his or her own conscience—even when those practices may be unpopular, unconventional, or even bizarre. Thus, historical free exercise cases have affirmed the right not to work on the Sabbath,[6] the right of parents not to send their children to school after completion of the eighth grade,[7] and even the right of a Santeria church to continue its practice of ritual animal sacrifice,[8] all on the basis that to do otherwise would substantially burden the individuals' sincerely-held religious beliefs without a compelling government interest to justify the burden.

The U. S. Supreme Court did make one notable departure from its usual deference to religious practices in *Employment Division v. Smith*, 494 U.S. 872 (1990). In that case, two employees were fired from their jobs because they ingested peyote for sacramental purposes at a ceremony of the Native American

[6] *Sherbert v. Verner,* 374 U.S. 398 (1963).
[7] *Wisconsin v. Yoder,* 406 U.S. 205 (1972).
[8] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

Church, of which they were both members. They applied for unemployment benefits, but those benefits were denied because their terminations resulted from their illegal use of a controlled substance. The Oregon Court of Appeals held that the denial of benefits violated the employees' First Amendment right to freely exercise their religion. However, the Supreme Court reversed, and held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." (*Id.* at p. 879.)

Thus, if a law is neutral and generally applicable, an individual must usually comply with it, even if it imposes a substantial burden on his or her religion. As noted in *Smith*, in observance of this principle, the Supreme Court has rejected religiously-motivated challenges to polygamy laws,[9] child labor laws,[10] and laws compelling military service.[11]

However, a finding that a law is neutral and generally applicable does not end a court's inquiry for free exercise analysis purposes. In response to the *Smith* decision, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA). RFRA directs that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general

[9] *Reynolds v. United States,* 98 U.S. 145 (1879).
[10] *Prince v. Massachusetts,* 321 U.S. 158 (1944).
[11] *Gillette v. U.S.,* 401 U.S. 437, 461 (1977).

applicability," unless the Government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." (42 U.S.C. § 2000bb–1.)

It is true that the U.S. Supreme Court did partially invalidate RFRA in *City of Boerne v. Flores,* 521 U.S. 507 (1997), but only insofar as it applied to the states. The federal government's actions are still subject to RFRA analysis in free exercise challenges. (*See Kikumura v. Hurley,* 242 F.3d 950, 958-960 (10th Cir. 2001).) Consequently, if it is proven that the mandate imposes a substantial burden on the Newlands' and Hercules's exercise of religion, the government will have to prove a compelling interest and use of the least restrictive means to accomplish that interest in order for the mandate to trump the Newlands' and Hercules' religious objections.

Though much could be said regarding the government's ability or inability to meet its burden of establishing a compelling interest and using the least restrictive means to accomplish such an interest, this brief is limited to the issue of whether the mandate imposes a substantial burden on the Newlands' and Hercules' rights to freely exercise their religion. As discussed further below, USJF urges this Court to find that it does.

II. THE HHS MANDATE IMPOSES A SUBSTANTIAL BURDEN ON THE NEWLANDS' AND HERCULES' RELIGIOUS EXERCISE

A. Refusing To Provide Contraceptive Coverage Is Religious Conduct

As an initial matter, before one can determine if a regulation imposes a substantial burden on religion, one must first determine whether the conduct regulated is, in fact, religious. In this case, the answer is an indisputable "yes."

Nearly all evangelical Christians object to emergency contraceptives (*i.e.,* abortifacients) on the basis that they prevent implantation of a fertilized egg and cause the living embryo to die. Mainstream Catholicism goes even further, by teaching that any form of contraception or sterilization is morally wrong.[12] The Newlands are devout Catholics and adhere to these beliefs.[13]

Accordingly, the U. S. Supreme Court has long recognized that abortion and related issues implicate sincerely-held religious beliefs. In the landmark case of *Roe v. Wade,* 410 U.S. 113, 116 (1973), even as the Court affirmed the legality of abortion, it acknowledged that "the sensitive and emotional nature of the abortion

---

[12] *See e.g.* Pope Paul VI's encyclical letter *Humanae Vitae* (July 25, 1968), available online at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html (last visited February 4, 2013):

> We are obliged once more to declare that the direct interruption of the generative process already begun and, above all, all direct abortion, even for therapeutic reasons, are to be absolutely excluded …. Equally to be condemned … is direct sterilization, whether of the man or of the woman, whether permanent or temporary. [¶] Similarly excluded is any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation—whether as an end or as a means.

[13] Appellees' Opening Brief, p. 3.

controversy" provokes "vigorous opposing views" and inspires "deep and seemingly absolute convictions." In *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992), the Court acknowledged that abortion has "profound moral and spiritual implications," and that "men and women of good conscience can disagree" about those implications and can find abortion "offensive to [their] most basic principles of morality." In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993), the Court admitted that "there are common and respectable reasons for opposing [abortion]." And, as recently as 2000, the Court acknowledged that "[m]illions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child." (*Stenberg v. Carhart,* 530 U.S. 914, 920 (2000).)

Thus, beliefs regarding abortion, contraception and similar practices do implicate sincerely-held religious convictions and accordingly, are entitled to First Amendment protection. The government has not argued that the Newlands' religious beliefs are anything other than sincere—nor would it be appropriate for this Court to decide the question, as the "[c]ourts are not arbiters of scriptural interpretation." (*Thomas v. Review Bd. Of Indiana Employment Security Div.,* 450 U.S. 707, 716 (1981).) The Newlands' conviction against providing contraceptive coverage for their employees is undeniably religious conduct and, as such, falls within the protection of RFRA.

B. The Mandate Imposes A Substantial Burden On The Newlands' Rights To Freely Exercise Their Religion

As noted above, RFRA requires courts to apply the pre-*Smith* standard of *Sherbert v. Verner*, 374 U.S. 398 (1963) to free exercise challenges to federal regulations. *Sherbert* established that a substantial burden on religious exercise exists, at a minimum, when the law or regulation at issue forces an individual "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept [government benefits], on the other hand." (*Id.* at p. 404.)

Nearly 20 years after deciding *Sherbert*, in *Thomas v. Review Bd. of Indiana Emp. Sec. Div.*, *supra,* 450 U.S. at p. 718, the Court confirmed this standard for establishing a substantial burden:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

In this Circuit, this Court has held that

> religious exercise is substantially burdened under [RFRA] when a government (1) requires participation in an activity prohibited by a sincerely held religious belief, or (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a

> sincerely held religious belief . . . . (*Abdulhaseeb v. Calbone,* 600 F.3d 1301, 1315 (10th Cir. 2010).)

The House of Representatives report on RFRA sets an even more lenient standard: "[I]n order to violate [RFRA], government activity need not coerce individuals into violating their religious beliefs nor penalize religious activity," but need only "have a substantial external impact on the practice of religion." (House Comm. On the Judiciary, Religious Freedom Restoration Act of 1993, H. Rep. No. 88, 103d Cong., 1st Sess. at 6-7 (1993).)

The mandate forces employers like Hercules to choose between paying for contraceptive and other "preventive services" they find immoral or suffering the imposition of significant fines.[14] If employers want to avoid both of these consequences, they must close their businesses entirely.

For any business owner, this coerced choice from among three equally injurious evils constitutes a substantial burden.

Though the government may argue that the mandate should be enforced against Hercules in furtherance of the public interest, the determination should hinge, not on whether there is a substantial burden on religious exercise, but on the strict scrutiny analysis, which the government bears the burden of satisfying. A

[14] It should be noted that it is not the amount of the fines—though formidable—that constitutes the substantial burden, but the mere fact that fines are imposed at all as a penalty for exercising one's religion. *See Wisconsin v. Yoder,* 406 U.S. 205 (1972), where the Supreme Court found that even a $5.00 fine for refusing to send their children to public high school imposed a substantial burden on the parents' free exercise of their Amish faith.

compelling interest may exist, and the mandate may be the least restrictive means of satisfying that interest, but in light of the mandate's coercive and punitive effects, it is disingenuous for HHS to claim that it does not impose a substantial burden on the Newlands' religious exercise.

Among legal scholars, even those in favor of enforcing the mandate against religious objectors agree that to do so will substantially burden employers' free exercise of religion: "Whether they be individuals or groups, religious objectors to the coverage mandate can solve the collision between their religious convictions and the demands of the law only by taking *extreme* measures, sometimes at great personal costs to themselves." (Robin F. Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and other Clashes Between Religion and the State,* 53 Boston College L. Rev. 1417, 1504 (2012), emphasis added.)

And, though she ultimately concludes that the mandate is the least restrictive means of furthering a compelling interest, this law review author has no trouble admitting the existence of a substantial burden:

> [A] Catholic employer can successfully raise a prima facie case under the RFRA because the HHS's contraceptive coverage mandate imposes a substantial burden on a sincere exercise of the Catholic religion by forcing Catholic employers to provide their employees coverage for contraceptives. … Catholic employers will likely meet [*Sherbert's*] threshold because the HHS's contraceptive coverage mandate would *force* them to choose between providing contraceptive

> coverage in their employees' health plans and paying a penalty for dropping its employees' health insurance coverage altogether.

(Destyn D. Stallings, *A Tough Pill to Swallow: Whether the Patient Protection and Affordable Care Act Obligations Catholic Organizations to Cover their Employees' Prescription Contraceptives,* 48 Tulsa L. Rev. 118, 137 (2012), emphasis added.)

Therefore, it is evident that the mandate, as currently drafted and applied, imposes a substantial burden on the Newlands' exercise of their religious convictions against paying for contraceptive and related services as part of their employees' group health insurance plan. Any other conclusion is simply irrational.

C. The Mandate Imposes A Substantial Burden On Hercules' Right To Freely Exercise Its Religion

For purposes of free exercise analysis, the Newlands and Hercules are essentially one and the same entity. The Newlands together own and operate Hercules, which is a closely-held, family-run business.[15] Nonetheless, it appears appropriate to discuss whether Hercules has a right, in the first instance, to invoke its own religious beliefs in its capacity as a for-profit, commercial employer.

RFRA specifically protects "a person's" right to free exercise of religion.[16] A corporation is included in the definition of a "person," pursuant to 1 U.S.C. § 1, because the term "person" is not otherwise defined and the context does not require

[15] *See* Appellees' Opening Brief, pp. 2-3, 18-19.
[16] 42 U.S.C. § 2000bb-1(a).

a different reading. It logically follows that a corporation, if capable of exercising religion, could also have that religious exercise substantially burdened by a government regulation like the mandate.

The government has effectively suggested that a religious business owner checks his religious convictions at the door when he or she enters the commercial marketplace. However, the case law does not support this view; in fact, a review of the U.S. Supreme Court's treatment of free exercise challenges by commercial actors reveals otherwise.

For example, in *U.S. v. Lee*, 455 U.S. 252 (1982), an Amish employer objected to the payment of social security taxes for his employees. He based his objection upon his sincerely-held religious belief that he and those of the Amish order should provide for their own elderly and disabled, in accordance with their interpretation of Scripture. Although the U.S. Supreme Court ultimately upheld the law's application to the employer, it first concluded that the law *did* substantially burden his right to exercise his religion. (*Id.* at pp. 257-258.) It was only after finding the presence of an "overriding governmental interest" that the court affirmed the law. (*Ibid.*) The existence of the substantial burden upon the employer's religious exercise was readily admitted.

By contrast, a substantial burden on religious exercise does *not* exist for a business owner whose religious convictions are merely inconvenienced or made

more expensive by the regulation in question. In *Braunfeld v. Brown*, 366 U.S. 599 (1961), the U.S. Supreme Court refused to grant Jewish shopkeepers an exemption from a mandatory Sunday closing law. The court found that the shopkeepers "were not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution." Instead, the law merely "operate[d] so as to make the practice of [the shopkeepers'] religious beliefs more expensive." (*Id.* at p. 605.)

Notably, the law challenged in *Braunfeld* did not criminalize patently religious conduct. Though the law prohibited opening for business on Sundays, it did *not* require the Jewish business owners to open for business on Saturdays—a directive which would have forced them to violate their religious convictions against working on the Sabbath. Thus, the court upheld the law because the shopkeepers could keep their religious convictions and at the same time still comply with the law.

In Hercules' case, its religious conduct in refusing to pay for contraceptives and related services for its employees *is* criminalized by imposition of the mandate. Unlike in *Braunfeld,* Hercules *is* faced with the choice of either forsaking its religious beliefs or facing criminal prosecution in the form of significant fines. Had this been the case in *Braunfeld,* the court would undoubtedly have found the existence of a substantial burden on the business owners' religious exercise.

Indeed, in *Lee,* the employer's refusal to comply with the social security tax law was a criminal offense, and accordingly, the court had no problem conceding the presence of a substantial burden on his religious exercise, even though it ultimately ruled against him due to the government's compelling interest in collecting social security taxes.

Hence, the conclusion to be reached is not that these business owners forfeited the rights to their religious convictions by entering the commercial marketplace. The courts will, and do, find a substantial burden on a commercial actor's religious exercise if the religious activity *itself* is penalized.

Such is patently the case here. It is not the employees' use of the contraceptives and other drugs to which Hercules objects, but rather to paying for the drugs with its own funds—funds that the officers and directors of the company have committed to use for the furtherance of the Christian faith.[17] Hercules cannot comply with the mandate in any way that would not violate its religious beliefs. A private non-denominational high school may believe and teach that premarital sex is morally wrong; the mandate is the equivalent of forcing that school to supply its students with condoms, free of charge. A restaurant owned by a Muslim may decline to serve pork products to its guests; the mandate is the equivalent of forcing that restaurant to make financial contributions to the National Pork

[17] *See* Appellees' Opening Brief, p. 3.

Producers Council. In either case, the religious convictions of the business owners are affronted and marginalized. Where a compelling interest exists and the challenged regulation is the least restrictive means of furthering that interest, such draconian laws may be appropriate. It cannot be said, however, that their imposition does not impose a substantial burden on the religious practices of those that must yield to their rule. The mandate definitely imposes a substantial burden on Hercules's right to freely exercise its religion.

CONCLUSION

Under RFRA, the government may not substantially burden an individual's—or a corporation's—right to freely exercise religion unless it meets the test of strict scrutiny. While this brief does not attempt to determine whether strict scrutiny is met, it does establish that the free exercise rights of the Newlands and their business, Hercules Industries, is significantly burdened by the operative mandate.

In this brief, USJF has endeavored to provide the Court with a thorough discussion of the substantial burden standard and its history. For the reasons presented herein, USJF respectfully requests that the Court find that the religious

exercise rights of the Newland family and Hercules Industries are substantially burdened by application of the mandate.

Date: March 1, 2013

Respectfully submitted,

By: _/s/ Angela C. Thompson_____

Angela C. Thompson
ATTORNEY AT LAW
P.O. Box 163461
Sacramento, CA 95816
T: (916) 642-6534; F: (916) 290-0272

Michael R. Connelly
UNITED STATES JUSTICE FOUNDATION
932 D Street, Suite 3
Ramona, CA 92065
T: (760) 788-6624
F: (760) 788-6414

Attorneys for Amicus Curiae
United States Justice Foundation

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 4,220 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Furthermore, this brief complies with the typeface requirements of Fed. R. App. P. 23(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft© Office Word 2007 and 14-point Times New Roman font.

Date: March 1, 2013 ___*/s/ Angela C. Thompson*_____
Angela C. Thompson

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2013, I electronically filed the foregoing Brief of *Amicus Curiae* United States Justice Foundation with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

MICHELLE R. BENNETT
U.S. Department of Justice
DC- Federal Programs
20 Massachusetts Ave N.W
Washington, D.C. 20008

STEVEN H. ADEN
Alliance Defending Freedom
801 G Street NW, Suite 509
Washington, D.C. 20001

FRANCIS J. MANION
American Center For Law & Justice
6375 New Hope Rd.
New Hope, KY 40052-0000

AYESHA N. KHAN
Americans United for Separation of Church and State
1301 K Street NW
Suite 850, East Tower
Washington, D.C. 20005

GEOFFREY R. SURTEES
American Center For Law & Justice
6375 New Hope Rd.
New Hope, KY 40052-0000

/s/ Angela C. Thompson
Angela C. Thompson